APPEAL NO. 022645
FILED DECEMBER 5, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on September 24, 2002. The hearing officer determined that respondent (claimant) reached maximum medical improvement (MMI) on July 6, 2000, with a 21% impairment rating (IR) pursuant to the first report of the Texas Workers' Compensation Commission (Commission)-selected designated doctor. Appellant (carrier) appealed and the file does not contain a response from claimant.

DECISION

We reverse and remand.

Carrier contends that the hearing officer erred in adopting the first IR certified by the designated doctor in this case. Carrier asserts that that IR included impairment for lumbar range of motion (ROM) loss based on ROM measurements that did not meet the validity criteria. Carrier contends that the hearing officer should have given presumptive weight to the designated doctor's amended report. Carrier asserts that in the amended report, the designated doctor properly lowered the IR regarding the amount of impairment for cervical ROM loss due to prior injuries and conditions.

No testimony was offered at the hearing. The case was presented to the hearing officer based upon oral argument of the parties and documentary evidence. The parties stipulated that claimant sustained a compensable injury on _____, although there was no stipulation regarding the exact nature and extent of the compensable injury. The medical records indicate that claimant complained of his head, neck, back, and left shoulder. The records in evidence reflect that on May 16, 2000, a carrier-selected required medical examination (RME) doctor certified that claimant was at MMI on that date with a 0% IR. The RME doctor noted that he believed claimant sustained, at most, a mild closed-head injury. He did not believe that claimant sustained any significant cervical, thoracic, or lumbar injury. In his report, the RME doctor noted significant degenerative changes in claimant's entire spine.

On June 20, 2000, claimant's treating doctor certified that claimant was at MMI on that date with a 24% IR. The treating doctor's IR consisted of 4% impairment for specific disorders of the cervical spine under Table 49, Section (II)(B) of the Guides to the Evaluation of Permanent Impairment, third edition, second printing, dated February 1989, published by the American Medical Association (AMA Guides); 8% impairment for loss of cervical ROM; 2% impairment from Table 49, Section (II)(B) of the AMA Guides for specific disorders of the thoracic spine; 4% for loss of thoracic ROM; 5% from Table 49, Section (II)(B) of the AMA Guides for specific disorders of the lumbar spine; and 3% for loss of lumbar ROM.

In his first report dated July 10, 2000, the designated doctor certified that claimant was at MMI on July 6, 2000, with a 21% IR. The 21% IR included 10% impairment for loss of lumbar ROM, and 13% impairment for loss of cervical ROM.

On September 28, 2000, a peer review report was generated for carrier by a physician's assistant who stated that the designated doctor's cervical measurements met the consistency requirements of the AMA Guides, but that clarification was needed regarding: (1) whether maximum effort was given, and (2) how much of the loss of ROM was due to prior surgery/injury and degenerative changes. The peer review report next noted that while the lumbar measurements met the consistency criteria, they did not meet the validity criteria. In addition, it was noted that, had the designated doctor properly combined his values, he would have come up with a 22% IR, not a 21%.

On November 30, 2000, the Commission sent the designated doctor a letter of clarification with the peer review report attached to it. On December 15, 2000, the designated doctor amended his certification, regarding both the date of MMI and the IR. The designated doctor placed the claimant at MMI on June 20, 2000, and certified an 11% IR. The designated doctor acknowledged that lumbar ROM was invalid because the sum of the sacral flexion and extension were not within 10 degrees of the tightest straight leg raise. The designated doctor changed the lumbar impairment to 3%. Next, the designated doctor amended the report to lower the cervical impairment from 13% to 8% due to apportionment for previous surgeries and chronic degenerative changes. The 13% cervical impairment he had found in his first report was all for loss of cervical ROM. The designated doctor declined to give a rating for the thoracic spine because he did not believe the mechanism of injury caused a thoracic injury. The designated doctor also stated that he did not believe that claimant qualified for any rating under Table 49, Section (II)(B). In response to another letter of clarification sent by the Commission with numerous questions from claimant attached, the designated doctor declined to change his amended certification.

Section 408.125(e) provides that where there is a dispute as to the IR, the report of the Commission-selected designated doctor is entitled to presumptive weight unless it is contrary to the great weight of the other medical evidence. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i)) provides that responses by designated doctors to requests for clarification from the Commission are considered to have presumptive weight, as they are part of the doctor's opinion. Whether the great weight of the other medical evidence is contrary to the opinion of the designated doctor is a factual determination for the hearing officer to resolve. A designated doctor selected to determine MMI and IR is not given presumptive weight regarding extent of injury. *See* Texas Workers' Compensation Commission Appeal No. 971195, decided August 6, 1997 (Unpublished). The designated doctor's job is to rate the entire injury. *See* Texas Workers' Compensation Commission Appeal No. 980996, decided June 22, 1998.

In the case before us, the designated doctor's first certification, by his own admission, contained an error regarding lumbar spine impairment for ROM loss. The hearing officer erred in adopting the first report of the designated doctor. However, the

designated doctor's amended certification was not entitled to presumptive weight pursuant to Rule 130.6(i) because he lowered his initial cervical ROM impairment due to "previous surgeries and chronic degenerative changes." We have held that the effects of a prior injury or a preexisting degenerative condition should not be discounted in the assessment of impairment for a current injury. Texas Workers' Compensation Commission Appeal No. 931130, decided January 26, 1994. When a claimant has impairment from the compensable injury, a carrier is generally not permitted a reduction in claimant's IR for that injury through apportionment for a prior noncompensable injury or preexisting degenerative condition unless the effects of the prior injury or condition are clearly separable. In this case, the designated doctor stated that "[i]t is unclear how much of his cervical [ROM] loss is due to previous surgery, old degenerative changes or his current injury . . . ." Therefore, the effects of the prior injury are not clearly separable and there can be no apportionment in this case. Texas Workers' Compensation Commission Appeal No. 94618, decided June 22, 1994.

The hearing officer erred in adopting the first report of the designated doctor. We reverse the hearing officer's decision regarding MMI and IR and remand the case back to the hearing officer. The hearing officer should contact and instruct the designated doctor that apportionment is not proper in this case regarding the cervical ROM loss because the effects of the prior injury are not clearly separable. The hearing officer should: (1) point out to the designated doctor that he had stated in his first report that "[i]t is unclear how much of his cervical [ROM] loss is due to previous surgery, old degenerative changes or his current injury . . ." and (2) tell the designated doctor that that statement indicates that the effects of the prior conditions are not separable. The hearing officer should then instruct the designated doctor to rate the injury consistent with that instruction. If the designated doctor refuses to cooperate with the Commission in this regard, then the hearing officer should determine whether there is another valid certification in evidence that may be adopted. If not, a new designated doctor may be selected by the Commission.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202, which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.

_____
Judy L. S. Barnes
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Margaret L. Turner
Appeals Judge